

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Special Administrative Law Judge found claimant entitled to benefits for a work disability arising from a work-related accidental injury of March 22, 1990, and found the State Self Insurance Fund responsible for payment. The State Self Insurance Fund appeals from the findings of the Special Administrative Law Judge and requests the Appeals Board review the finding it is responsible for the payment of the claim or whether, instead, the responsible party is Douglas County, along with the issue of nature and extent of disability. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

For the reasons expressed below, the Appeals Board affirms the award of benefits based upon a work disability of sixty-five percent (65%), but finds the Award should be paid by Douglas County rather than the State Self Insurance Fund.

(1) For purposes of the Workers Compensation Act, Douglas County is responsible for providing workers compensation benefits for claimant.

The facts regarding claimant's employment are not in dispute. Claimant was employed by the Douglas County District Attorney's office as a secretary. Claimant was hired by, and her duties and salary were set by, the Douglas County District Attorney. The Douglas County Board of Commissioners formulates the budget for the District Attorney's office and pays the expenses of the budget, including the salaries of the employees.

Although Douglas County argues claimant was hired and controlled by the District Attorney and District Attorneys are elected as State rather than County officers, K.S.A. 1989 Supp. 44-505c makes Douglas County the responsible party for worker's compensation benefits. This statute provides:

"Any city, county, school district or other political subdivision or municipality is hereby authorized to pay the cost of workmen's compensation coverage for its employees as provided by this act and may pay such costs from the various funds from which compensation is paid to its employees. . . . Counties shall provide for coverage of district court officers and **employees whose total salary is payable by counties.** . . ." (Emphasis ours.)

Although it is apparent other interpretations may be given the statute, the interpretation applied by the Appeals Board to effectuate the intent and purpose of the act is that "employees whose total salary is payable by counties" includes all employees receiving their total salary from the county and not only those working in the District Court. As claimant's salary was payable by Douglas County, it is responsible for payment of benefits due as a result of this claim. The Appeals Board acknowledges that the Attorney General has issued an opinion that a District Attorney is a State Employee for purpose of the Kansas Tort Claims Act, but we do not find that opinion to be persuasive in the arena of workers compensation.

(2) The finding of the Special Administrative Law Judge that claimant has sustained a sixty-five percent (65%) work disability should be affirmed. The Appeals Board finds claimant has developed lateral epicondylitis with reflex sympathetic dystrophy in the left upper extremity and shoulder as a direct result of the accident she experienced at work on March 22, 1990, when she struck her left elbow on a door. As a result of this accident, claimant has limited motion in her elbow and shoulder and experiences debilitating pain when she attempts to use her left arm. As explained by one of her treating physicians, board-certified orthopedic surgeon John Pazell, M.D., reflex sympathetic dystrophy is a strange phenomenon where the sympathetic nerves begin to fire, which causes the blood vessels to dilate, which then causes swelling. This causes pain and stiffness, which in turn, causes a message to be sent to the brain to again fire the nerves, thus, resulting in a vicious circle of stiffness and pain. The condition can be severely disabling. Both Dr. Pazell and board-certified orthopedic surgeon John J. Wertzberger, M.D., testified there is no reason to believe that claimant's pain is less debilitating than described by her.

The Appeals Board acknowledges the testimony of psychiatrist Roy B. LaCoursiere, M.D., that claimant is malingering. However, Dr. LaCoursiere's testimony is unconvincing in light of the other medical evidence presented and his admission that reflex sympathetic dystrophy is outside his specialty.

As a result of her work-related injury, Dr. Pazell believes claimant has sustained permanent impairment of function in the range of twenty-one to twenty-seven percent (21%-27%). Claimant's medical records were provided to vocational rehabilitation experts, Bud Langston and Michael Dreiling, for their opinions regarding loss of ability to perform work in the open labor market and to earn a comparable wage.

Mr. Langston saw claimant at the request of the State Self Insurance Fund. Although Mr. Langston believes claimant's left arm is functionally useless, he believes she retains the ability to work as a receptionist, sales counter clerk, teacher's aide, or quality control inspector. Mr. Langston believes that claimant has lost the ability to perform work in seventy-two percent (72%) of the open labor market, and has experienced a fifty percent (50%) loss of her ability to earn a comparable wage. Michael Dreiling saw claimant at her attorney's request. Although Mr. Dreiling has concerns whether claimant is able to work at all, he believes she has definitely lost ninety percent (90%) of her ability to perform work in the open labor market. Because she retains the ability to earn \$5.00 to \$5.50 per hour compared to a pre-injury wage of \$11.00 per hour, Mr. Dreiling believes claimant has lost fifty percent (50%) of her ability to earn a comparable wage as a result of this injury.

The opinions of both vocational rehabilitation experts are equally persuasive and neither outweighs the other. The Appeals Board finds that claimant has lost between seventy-two percent and ninety percent (72%-90%), or an average of eighty-one percent (81%), of her ability to perform work in the open labor market, and fifty percent (50%) of her ability to earn a comparable wage. Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, there is no compelling reason in this case to give either factor greater weight. Therefore, the Appeals Board averages both losses and finds claimant has sustained a sixty-five percent (65%) permanent partial general disability in accordance with K.S.A. 1989 Supp. 44-510e. This statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been

reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

(3) The Appeals Board adopts the findings and conclusions set forth by the Special Administrative Law Judge in his Award dated April 21, 1994, that are not inconsistent with those expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated April 21, 1994, shall be, and hereby is, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carole L. Stuart, and against the respondent, Douglas County, for an accidental injury which occurred on March 22, 1990, and based on an average weekly wage of \$458.50, for 80.57 weeks of temporary total disability compensation at the rate of \$271.00 per week in the sum of \$21,834.47 and 334.43 weeks of compensation at the rate of \$198.70 per week in the sum of \$66,451.24 for 65% permanent partial general body work disability, making a total award of \$88,285.71.

As of April 21, 1994, there is due and owing claimant \$21,834.47 in temporary total compensation and 132.57 weeks of permanent partial compensation at the rate of \$198.70 per week in the sum of \$26,341.66 making a total due and owing of \$48,176.13.

The remaining 201.86 weeks are to be paid at the rate of \$198.70 per week until fully paid or further order of the director.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the respondent, Douglas County, to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Robert S. Schloetzer, C.S.R. Transcript of Preliminary Hearing (11-7-90)	\$ 41.15
Transcript of Preliminary Hearing (9-3-91)	\$ 45.49
Nora Lyon & Associates Transcript of Preliminary Hearing (11-19-91)	\$129.95

Appino & Achten Reporting Service	
Transcript of Regular Hearing	\$243.40
Deposition of Bud Langston	\$135.40
Deposition of Roy B. LaCoursiere, M.D.	\$311.60

Braksick Reporting Service	
Deposition of Carole L. Stuart (9-18-91)	\$301.40
Deposition of Carole L. Stuart (1-25-93)	\$319.80
Deposition of John J. Wertzberger, M.D.	\$278.45

Jay Suddreth & Associates	
Deposition of Michael Dreiling	\$353.20
Deposition of John Pazell, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Margaret L. Pemberton, Overland Park, KS
Jeff K. Cooper, Topeka, KS
Robert W. Fairchild, Lawrence, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director